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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

DONGYUAN LI,

Defendant.

No. SA CR 19-00016-JVS

GOVERNMENT'S MOTION FOR COURT  
ORDER DECLARING PARTIAL WAIVER OF  
ATTORNEY-CLIENT PRIVILEGE AND  
COMPELLING DISCLOSURE OF CERTAIN  
ATTORNEY-CLIENT COMMUNICATIONS;  
MEMORANDUM OF POINTS AND  
AUTHORITIES; [PROPOSED] ORDER  
REGARDING WAIVER OF ATTORNEY-  
CLIENT PRIVILEGE

Plaintiff United States of America, by and through its counsel of record, the United States Attorney for the Central District of California and Assistant United States Attorney Charles E. Pell, hereby files this motion for a Court Order: (1) declaring that defendant DONGYUAN LI has waived her attorney-client privilege with respect to communications between her and her attorneys Thomas P. O'Brien and David J. Carroll, concerning the events and facts surrounding defendant's conversation with defense counsel that is proffered in the declaration of defense counsel David J. Carroll (DE

1 43-1) submitted in support of defendant's motion to revoke the  
2 Magistrate Court's detention Orders (DE 43); and (2) compelling  
3 attorneys Thomas P. O'Brien and David J. Carroll to testify at the  
4 hearing on April 8, 2019, about those communications with defendant.

5 This application is based upon the attached memorandum of points  
6 and authorities, all files and records in the case, and upon such  
7 further evidence or argument as may be requested by the Court.

8 Dated: April 2, 2019

Respectfully submitted,

9 NICOLA T. HANNA  
United States Attorney

10 DENNISE D. WILLETT  
11 Assistant United States Attorney  
12 Chief, Santa Ana Branch Office

13 /s/  
14 CHARLES E. PELL  
Assistant United States Attorney  
Santa Ana Branch Office

15 Attorneys for Plaintiff/Respondent  
16 UNITED STATES OF AMERICA  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. PROCEDURAL BACKGROUND**

The government's opposition filed earlier this evening details the relevant procedural history. (DE45 at 1-2.)

Also on March 27, 2019, in support of defendant's motion to revoke the Magistrate Court's detention Orders and argued therein (DE43), the defense attached the declaration of defense counsel David J. Carroll that proffered the date and substance of communications between defendant and defense counsel (DE43-1).

**II. SUMMARY OF ARGUMENT**

Under Ninth Circuit law, defendant has waived her attorney-client privilege with respect to the conversation she had with defense counsel that she proffered in defense counsel's declaration that was submitted in support of her appeal of the Magistrate Court's detention decisions. In her motion, she relies on and argues using communications between her and her attorneys to support her challenge to the Magistrate Court's detention Orders.

The government's opposition to defendant's motion adequately explains why the Magistrate Court correctly decided the detention issue, twice. Nevertheless, because defendant has raised the substance of her communication with defense counsel in her counsel's declaration and argued it in her motion, in order for this Court and the government to fairly address it, the Court and government need to be provided accurate facts regarding what defense counsel actually said to or advised defendant about the issues she raises in her motion as related to that communication, as well as defendant's statements in that same conversation. Consequently, the government requests that the Court: (1) declare that defendant DONGYUAN LI has

1 waived her attorney-client privilege with respect to communications  
2 between her and her attorneys Thomas P. O'Brien and David J. Carroll,  
3 concerning the events and facts involved in defendant's conversation  
4 with defense counsel that is proffered in the declaration of defense  
5 counsel David J. Carroll (DE43-1) submitted in support of defendant's  
6 motion to revoke the Magistrate Court's detention Orders (DE 43); and  
7 (2) compel attorneys Thomas P. O'Brien and David J. Carroll to  
8 testify during the hearing on April 8, 2019, about those  
9 communications with defendant.<sup>1</sup>

### 10 **III. ARGUMENT**

11 In her motion, defendant claims that discussions that occurred  
12 with her counsel support her challenge to the Magistrate Court's  
13 detention decisions. Specifically, defendant claims that on January  
14 23, 2019, her counsel discussed with her defense counsel's meeting  
15 with the government that occurred the previous day, including "that  
16 Ms. Li's indictment was imminent." (DE43-1 at 2.) She also argues  
17 in her motion that she did not flee, even though based on that  
18 conversation with defense counsel, there was "no doubt in her mind  
19 that the government intended to prosecute her." (DE43 at 12.)

20 The attorney-client privilege protects confidential  
21 communications between attorneys and their clients. Fed. R. Evid.  
22 501, 502. However, the privilege may be waived as to a particular  
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25 <sup>1</sup> The day after defendant filed her motion, on March 28, 2019,  
26 the government reached out to defense counsel to determine whether  
27 they would prefer to withdraw the declaration and argument premised  
28 upon their communications with the defendant, because the government  
would otherwise be filing the instant motion seeking a finding of  
waiver of the attorney-client privilege. Defense counsel indicated  
that they did not believe there had been a waiver, so would not be  
withdrawing the declaration, and they would oppose a motion by the  
government that requested waiver.

1 communication between an attorney and client if it is disclosed by  
2 either of them.

3 Defendant affirmatively raised the substance of conversations  
4 between her and her counsel by arguing it in her motion and  
5 proffering it in her counsel's declaration in this matter.  
6 Accordingly, by arguing and proffering her conversation with defense  
7 counsel, defendant has waived the attorney-client privilege on that  
8 same conversation. See, e.g., Bittaker v. Woodford, 331 F.3d 715,  
9 716 (9th Cir. 2003) ("It has long been the rule in the federal courts  
10 that, where a habeas petition raises a claim of ineffective  
11 assistance of counsel, he waives the attorney-client privilege as to  
12 all communications with his allegedly ineffective lawyer."); see also  
13 Wharton v. Calderon, 127 F.3d 1201, 1203 (9th Cir. 1997) (defendant  
14 waived attorney-client privilege by raising ineffective assistance of  
15 counsel claim in a habeas proceeding); Tasby v. United States, 504  
16 F.2d 332, 336 (8th Cir. 1974) (attorney-client privilege waived when  
17 defendant, in § 2255 proceeding, attacked his attorney's competence  
18 in giving legal advice, and ascribed course of action to his attorney  
19 that raised specter of incompetence). Tasby explained the rationale  
20 for the rule, which is premised on fairness. 504 F.2d at 336.

21 The same reasoning applies to the non-habeas context, where a  
22 party affirmatively raises attorney-client communications in their  
23 case. E.g., Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.,  
24 745 F.3d 343, 353 (9th Cir. 2014) ("Defendants waived the protection  
25 of the privilege by relying on an advice-of-counsel defense.");  
26 United States v. Quiel, 595 F. App'x 692, 694 (9th Cir. 2014) ("A  
27 party who affirmatively places its attorney-client communications at  
28 issue in a litigation implicitly waives the privilege.").

1 In other words, defendant cannot in this case try to use her  
2 communications with defense counsel as a sword to wield against the  
3 Magistrate Court's detention Orders, but then simultaneously use the  
4 attorney-client privilege as a shield against this Court and the  
5 government's inquiring as to the substance of those same  
6 communications. E.g., United States v. Ortland, 109 F.3d 539, 543  
7 (9th Cir. 1997) ("The privilege which protects attorney-client  
8 communications may not be used both as a sword and a shield. Where a  
9 party raises a claim which *in fairness* requires disclosure of the  
10 protected communication, the privilege may be implicitly waived."  
11 (emphasis in original) (citation omitted)); see also United States v.  
12 Amlani, 169 F.3d 1189, 1195-96 (9th Cir. 1999) (finding that district  
13 court did not err by finding waiver of attorney-client privilege in  
14 case where defendant claimed that prosecutor's disparaging remarks  
15 about his attorney caused him to sever his attorney-client  
16 relationship). That would not be fair.

17 Under the Ninth Circuit's three-part Amlani test,<sup>2</sup> defendant has  
18 waived her attorney-client privilege. She waived the attorney-client  
19 privilege by affirmatively raising and proffering her conversations  
20 with counsel on an issue that she then argued in her motion to revoke  
21 the Magistrate Court's detention Orders. The government respectfully  
22 requests that the Court order a partial waiver of the attorney-client  
23 privilege and compel disclosure by defense counsel of all

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25 <sup>2</sup> The Ninth Circuit generally uses a three-prong test to  
26 determine whether a waiver has been effected: (1) whether the party  
27 is asserting the privilege as the result of some affirmative act,  
28 such as filing suit; (2) whether through that affirmative act, the  
asserting party puts the privileged information at issue; and  
(3) whether allowing the privilege would deny the opposing party  
access to information vital to its case. Id. at 1195 (quoting  
cases).

1 communications with defendant that surround the communication that  
2 she raised and argued in her motion and described in her defense  
3 counsel's declaration.

4 The scope of the proposed waiver is narrow. The waiver is  
5 limited to the conversation between defendant and her counsel on a  
6 specific date, January 23, 2019, about their conversation with the  
7 government the previous day regarding whether she would be charged,  
8 detained, and surrounding facts. Accord In re Premera Blue Cross  
9 Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230, 1249 (D. Or.  
10 2017) ("Regarding the scope of this waiver, '[t]he widely applied  
11 standard for determining the scope of a waiver of attorney-client  
12 privilege is that the waiver applies to all other communications  
13 relating to the same subject matter.'" (quoting case)).

14 Last, the Proposed Order appropriately strikes a balance between  
15 protecting defendant's attorney-client privilege and permitting a  
16 fair resolution of her motion. The Proposed Order limits the waiver  
17 to "communications between her and her attorneys Thomas P. O'Brien  
18 and David J. Carroll, concerning the events and facts surrounding  
19 defendant's conversation with defense counsel on January 23, 2019,  
20 that is proffered in the declaration of defense counsel David J.  
21 Carroll (DE 43-1) submitted in support of defendant's motion to  
22 revoke the Magistrate Court's detention Orders (DE 43)," which she  
23 affirmatively put at issue by raising and arguing it in her motion  
24 and attached declaration.

#### 25 **IV. CONCLUSION**

26 For the forgoing reasons, the government requests that the Court  
27 enter an Order that finds a partial waiver of the attorney-client  
28 privilege and compels defense counsel to testify about communications

1 with defendant proffered in the declaration of defense counsel and  
2 presented by defendant in her motion.